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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME CORNELL SESSION,

Defendant and Appellant.

E053942

(Super.Ct.No. FVI023867)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Steven Schorr, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Heidi T. Salerno, Deputy Attorney General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant, Jerome Cornell Session, and Shamar Lavette Thornton were charged in the same information and tried separately for the March 2006 robbery of an Apple Valley convenience store and the murder of the store clerk, Edward Gould, during the commission of the robbery. Defendant was an accomplice to the murder. The evidence showed that Thornton shot and killed Gould during the robbery, but defendant was unarmed. Defendant told the police he did not know Thornton was armed until after the robbery began, he was surprised when Thornton shot and killed Gould, and he only intended to “sock” or punch Gould a few times so that he and Thornton could escape from the scene.

This appeal concerns the jury’s true finding on a special circumstance allegation of murder during the commission of a robbery. (Pen. Code, § 190.2, subd. (a)(17)(A)).<sup>1</sup> The allegation required the jury to find that defendant engaged in the commission of the robbery with either intent to kill or with reckless indifference for human life. (§ 190.2, subd. (d).) Defendant claims the court prejudicially erred in refusing his request to give a modified version of CALCRIM No. 705 concerning his intent or mental state. The modifications would have emphasized that defendant’s statements to police were the only *direct* evidence of his intent or mental state, and all other evidence of his mental state was circumstantial evidence. Defendant claims the court’s refusal to modify the instruction violated his Sixth Amendment right to a jury trial and to adequate instructions on his

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

defense theory that he did not possess the mental state required to support the special circumstance allegation.

We conclude that the requested modifications to CALCRIM No. 705 were properly refused, because the requested modifications were duplicative of and adequately covered in other instructions. We also conclude that any error in refusing the requested modifications was harmless because there is no reasonable probability the jury would have found the special circumstance allegation not true had CALCRIM No. 705 been modified as defendant requested. We therefore affirm the judgment in its entirety.

## II. FACTS AND PROCEDURAL HISTORY

### A. *Background*

Shortly before 1:00 a.m. on March 21, 2006, defendant and Thornton robbed a convenience store on the corner of Apple Valley Road and Highway 18 in Apple Valley. When the two men entered the store, Gould, the store clerk, was sweeping between two aisles. Thornton pointed a gun at Gould, and the two men forced the clerk to give them the money in the store's two cash registers, which totaled approximately \$70. Gould was very cooperative with the robbers and pleaded with them to not hurt him. Defendant then took Gould into a back area of the store to "sock on" him so they could buy time to escape, but Thornton intervened and shot Gould 9 to 10 times with a nine-millimeter semiautomatic handgun at close range. Gould died shortly thereafter.

The Apple Valley convenience store contained a closed circuit surveillance camera system that recorded the robbery from several different angles as it took place in

the store. The surveillance videos were played for the jury at trial. One camera showed defendant and Thornton moving Gould behind the counter, where he opened the cash registers for the robbers. Another camera showed the two men forcing Gould toward the back of the store, presumably into the back storage room where Gould was killed.

Shortly after the robbery and murder, police released surveillance videos and still photographs of Thornton and defendant to the media. Two days later, defendant turned himself in to the police. While in custody, he waived his *Miranda*<sup>2</sup> rights and spoke to the police about the robbery. The interview was recorded and admitted into evidence at defendant's trial.

In the interview, defendant explained that he and Thornton had decided to rob the Apple Valley convenience store because they needed money. The two men drove by the store and noticed that there were no customers present, so they parked their car and entered the store. Upon entering, defendant heard "screaming and yelling" and then heard Gould say, "okay, okay, I'm gonna go get it . . . ." At that point, he noticed that Thornton was pointing a gun at Gould. He claimed that he was not expecting Thornton to use a gun during the robbery, and thought they would simply "strong arm" the clerk without weapons. Defendant stated that he was unaware Thornton was carrying a gun that night, although he had heard of Thornton carrying guns previously. Despite the

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<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

surprise of seeing Thornton with a gun, he nevertheless continued to participate in the robbery.

While Thornton was pointing the gun at Gould, defendant pulled Gould toward the cash registers and forced him to open the registers and hand over the money. Defendant pocketed the money and took Gould toward the back area with the intention of “sock[ing] on him a couple times, just so [they could] get enough time to get away . . . .” Thornton began asking Gould for the surveillance tape, but Gould said he did not have access to the tape.

After they entered the back area, defendant pushed Gould against a wall. As defendant raised his fist to hit Gould, Thornton shot Gould. Defendant claimed the shot grazed his arm, and he turned to Thornton with a look of shock before turning around and quickly walking out of the store toward his car. After defendant left the back room, he heard “[a]t least” seven more shots coming from the back area.

Defendant and Thornton returned to their car and split the money taken from the cash registers. Thornton apologized to defendant for grazing him with a bullet, and told defendant if they were caught, he, Thornton, would take the “rap” for what had happened.

#### *B. Procedural History*

This appeal follows an earlier appeal and retrial on the robbery-murder special-circumstance allegation. In the earlier appeal, we reversed the special circumstance finding due to prejudicial instructional error, but we affirmed defendant’s first degree murder and second degree robbery convictions and the court’s finding that defendant had

a prior strike conviction. (*People v. Session* (Feb. 9, 2011, E049939) [nonpub. opn.] [Fourth Dist., Div. Two].) In the first trial, the court did not instruct pursuant to CALCRIM No. 703 that, in order to find the robbery-murder special-circumstance allegation true, the jury had to find that defendant participated in the robbery with either intent to kill or reckless indifference to human life. (*Ibid.*) In the retrial on the special circumstance allegation, the jury was given CALCRIM No. 703 and found the allegation true. Defendant was then sentenced to life in prison without the possibility of parole for the murder. (§ 190.2, subd. (d).)

### III. DISCUSSION

#### A. *The Trial Court Properly Refused Defendant's Request to Modify CALCRIM No. 705*

Defendant claims the trial court prejudicially erred in refusing his request to give a modified version of CALCRIM No. 705, concerning direct and circumstantial evidence of his mental state concerning the robbery-murder special-circumstance allegation. We conclude the requested modifications were properly refused.

##### 1. Background

In its standard, unmodified form, CALCRIM No. 705 instructs that, in order to prove a special circumstance allegation, the People must prove the defendant did the acts charged and acted with a particular intent or mental state. The instruction also advises the jury on the proper use of circumstantial evidence to prove intent or mental state. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 141-142.) To this end, CALCRIM No. 705 instructs the jury that it may rely on circumstantial evidence to conclude that the

defendant had the required intent or mental state, but states that, in order to rely on circumstantial evidence, the jury must be convinced beyond a reasonable doubt that the People proved each fact essential to that conclusion, and the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent or mental state.<sup>3</sup>

Here, the alleged special circumstance of murder in the commission of robbery (§ 190.2, subd. (a)(17)(A)) required the People to prove that defendant acted with either intent to kill or reckless indifference to human life when he participated in the robbery. (*People v. Estrada* (1995) 11 Cal.4th 568, 575; CALCRIM No. 703.) As given, CALCRIM No. 705 instructed the jury that the mental state necessary to prove the allegation— intent to kill or reckless indifference to human life—could be proved by

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<sup>3</sup> In its standard form, CALCRIM No. 705 states: “In order to prove the special circumstance[s] of \_\_\_\_\_ <insert special circumstance[s] with intent requirement>, the People must prove not only that the defendant did the act[s] charged, but also that (he/she) acted with a particular intent or mental state. The instruction for (each/the) special circumstance explains the intent or mental state required. [¶] An intent or mental state may be proved by circumstantial evidence. [¶] Before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent or mental state. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state and another reasonable conclusion supports a finding that the defendant did not have the required intent or mental state, you must conclude that the required intent or mental state was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.”

circumstantial evidence, and advised the jury on the proper use of circumstantial evidence.

Defendant did not dispute that he participated in the robbery, but claimed he did not participate with an intent to kill or with reckless indifference to life, as evidenced by his statements to the police. He claimed his statements to the police that he was unaware that Thornton was carrying a gun until after the robbery began, and that he only intended to “sock on” (hit) Gould a few times in order to have time to escape the scene, constituted the only direct evidence of his mental state, and showed he did not act with intent to kill or reckless indifference to human life. Thus, he claimed there was no direct evidence that he acted with the required mental state. In order to emphasize or pinpoint this defense theory, defense counsel asked the court to modify CALCRIM No. 705 to include an explanation that intent can be established by *either direct or circumstantial evidence*, but direct evidence of intent can only come from a specific statement made by the defendant.<sup>4</sup>

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<sup>4</sup> Defense counsel asked the court to modify CALCRIM No. 705 to read as follows (the modifications are shown in bold italicized type): “In order to prove the special circumstance of Murder in Commission of Robbery *while defendant had either the specific intent to kill or acted with reckless indifference to human life*, the People must prove not only that the defendant did the act[s] charged, but also that he acted with a particular intent or mental state. The instruction for the special circumstance explains the intent or mental state required. [¶] An intent or mental state may be proved by *either direct or circumstantial evidence*. [¶] *The only direct evidence of intent, or a state of mind, is a specific statement of intent or state of mind from the person whose intent or state of mind is in issue. All other evidence on this issue is circumstantial evidence.*”

When the court asked defense counsel to explain why CALCRIM No. 705 needed to be modified, counsel explained that: “[T]he problem with [CALCRIM No.] 705 is that it’s not really clear what is direct and circumstantial evidence when it comes to a statement of intent or state of mind. . . . [¶] . . . [¶] What I’m trying to do in this [modified] instruction is advise the jurors that for the most part with this one exception they will be dealing with circumstantial evidence on the issue of state of mind or intent.” The prosecutor countered that the point was “directly advanced” in CALCRIM No. 223, and CALCRIM No. 705 did not “list any area in which a defendant may have a pinpoint cite.” The court agreed that the modification was unnecessary because “the other CALCRIM instructions satisfactorily cover[ed] the area . . . .”

## 2. Analysis

A court has a duty to instruct on “those principles connected with the evidence and which are necessary for the jury’s understanding of the case.” (*People v. Estrada, supra*, 11 Cal.4th at p. 574.) Here, the court had a duty to instruct the jury sua sponte on the proper use of circumstantial evidence, because the prosecution substantially relied on circumstantial evidence to establish the intent element of the robbery-murder special-circumstance allegation. (See *People v. Yeoman, supra*, 31 Cal.4th at p. 142, citing *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.)

If intent or mental state is the only element of a special circumstance allegation that rests on circumstantial evidence, then CALCRIM No. 705 should be given in place of CALCRIM No. 704, because CALCRIM No. 704 instructs on the proper use of

circumstantial evidence to prove *all* elements of a special circumstance allegation, not just the intent or mental state element. (Bench Notes to CALCRIM No. 705; *People v. Marshall* (1996) 13 Cal.4th 799, 849.) The court may, however, give both CALCRIM Nos. 704 and 705, and may also give CALCRIM Nos. 224 (Circumstantial Evidence: Sufficiency of Evidence) and 225 (Circumstantial Evidence: Intent or Mental State) in nonspecial circumstance cases. (Bench Notes to CALCRIM No. 705; see *People v. Maury* (2003) 30 Cal.4th 342, 428.) CALCRIM Nos. 224 and 225 instruct on the proper use of circumstantial evidence to prove, respectively, the intent element and all elements of a crime.

When a court gives either CALCRIM No. 224 or 225, it is required to give CALCRIM No. 223 (Direct and Circumstantial Evidence: Defined). (Bench Notes to CALCRIM No. 223.) CALCRIM No. 223 defines direct and circumstantial evidence, gives examples of both, and instructs that “[b]oth direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent or mental state . . . .” (CALCRIM No. 223.) Here, the trial court gave CALCRIM Nos. 223, 224, 225, 703, 704, and 705.

Defendant argues that “[w]hile [the instructions the trial court gave] explained the difference between direct and circumstantial evidence (CALCRIM [No.] 223) and how to evaluate the latter both generally (CALCRIM [No.] 224) and in the context of determining mental states required to establish either a specified offense (CALCRIM [No.] 225) or a special circumstance (CALCRIM [No.] 703), *none of the instructions*

*alerted the jury that an intent or mental state could be proved using either type of evidence[,] or that all evidence pertaining to the issue should be deemed circumstantial and evaluated accordingly unless it consisted of a specific statement of intent or state of mind made by the person whose mental state was at issue.”* (Italics added.) This is simply not true. As indicated, the trial court gave CALCRIM No. 223, which explicitly states that intent or mental state may be proved using either direct or circumstantial evidence. (CALCRIM No. 223.) CALCRIM No. 223 also contains a clear and legally accurate description of how to determine whether evidence should be deemed circumstantial or direct.

Defendant principally claims he is entitled to a modification of an otherwise accurate instruction where the modification constitutes a correct statement of the law, is nonargumentative, and amplifies legal principles critical to an understanding of the defense theory. (*Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148.) He argues his proposed modifications to CALCRIM No. 705 should have been given because they clarified an area of concern directly applicable to the legal issues involved in his case.

Nevertheless, a court is not required to give instructions that are duplicative of other instructions. (*People v. Lewis* (2001) 25 Cal.4th 610, 653) [because court gave general instructions on how to consider circumstantial evidence to prove guilt, it “was not required to provide a repetitive instruction informing the jury, more specifically, how to evaluate circumstantial evidence of specific intent as it relates to proving the special

circumstance allegations”]; *People v. Hines* (1997) 15 Cal.4th 997, 1051) [“[t]he two instructions, each of which discusses the sufficiency of circumstantial evidence to prove special circumstance allegations, were duplicative of another instruction . . . by the court telling the jury how to evaluate circumstantial evidence generally”].) The proposed modifications to CALCRIM No. 705 were duplicative and unnecessary restatements of the other instructions, and for this reason were properly refused.

Indeed, the proposed modification that intent or mental state may be proved by “*either direct or*” circumstantial evidence restated CALCRIM No. 223’s admonition that “[b]oth direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state . . . .” The request to add to CALCRIM No. 705 the statement, “[**T**he *only direct evidence of intent, or a state of mind, is a specific statement of intent or state of mind from the person whose intent or state of mind is in issue. All other evidence on this issue is circumstantial evidence,*” essentially mirrored the example of direct evidence provided in CALCRIM No. 223.<sup>5</sup> The third and final proposed modification, that “*while defendant had either the specific intent to kill or acted with reckless indifference to human life,*” simply mirrored CALCRIM No. 703, which instructed that in order to find the special circumstance

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<sup>5</sup> CALCRIM No. 223 explains that a witness’s statement that “it [is] raining outside” constitutes direct evidence that it is raining. This example is nearly identical to defendant’s claim that his own statements concerning his intent or mental state was the only direct evidence of his intent or mental state.

allegation true the jury had to find that defendant acted “either with intent to kill or with reckless indifference to human life.”

The California Supreme Court has observed that reviewing courts are to credit jurors with intelligence and common sense and presume they “generally understand and follow instructions.” (*People v. Myles* (2012) 53 Cal.4th 1181, 1211-1212, citing *People v. McKinnon* (2011) 52 Cal.4th 610, 670.) The instructions given here, namely, CALCRIM Nos. 223, 224, 225, 703, 704, and 705, accurately and thoroughly instructed the jury on the differences between direct and circumstantial evidence and on how to evaluate circumstantial evidence on the question of intent or mental state. We presume the jurors followed these instructions and understood that (1) defendant’s statements concerning his mental state were the only direct evidence of his mental state, (2) all other evidence of defendant’s mental state was circumstantial evidence, and (3) the jury only relied on the circumstantial evidence if it was convinced the prosecution proved the mental state element beyond a reasonable doubt, and the circumstantial evidence did not support a contrary conclusion.

*B. Any Error in Failing to Modify CALCRIM No. 705 as Defendant Requested Was Harmless; There is No Reasonable Probability the Error Affected the True Finding on the Robbery-murder Special-circumstance Allegation*

When trial error implicates a criminal defendant’s federal constitutional rights, the reviewing court must “be able to declare a belief that [the error] was harmless beyond a reasonable doubt” before it can find the error not prejudicial or harmless. (*Chapman v.*

*California* (1967) 386 U.S. 18, 24.) This is the *Chapman* standard of review. If, on the other hand, the error arises under state law or state procedure, a more forgiving standard of review is appropriate under the *Watson* test. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Under this test, the error is harmless if there is no “reasonabl[e] probab[ility]” the error affected the outcome. (*Ibid.*) A reasonable probability does not mean “more likely than not”; rather, a reasonable probability exists when there is merely a “*reasonable chance*, more than an *abstract possibility*” of a different outcome. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

Defendant argues that a *Chapman* standard of review is appropriate here because the refusal to modify CALCRIM No. 705 implicated his federal constitutional right to a jury trial and adequate instructions on his theory of his defense. He fails to adequately explain his argument, however, and supports it with citations to inapposite cases, namely, *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 876, *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372, and *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202. The cited cases are inapposite because each involved the *failure to give* an instruction, which raised federal constitutional issues and was therefore subject to the *Chapman* standard of review. Here, by contrast, defendant only sought to *add* language to CALCRIM No. 705 that was effectively contained in other given instructions. We are therefore unpersuaded that defendant’s federal constitutional rights were implicated. Surprisingly, the People implicitly concede that a *Chapman* standard of review applies. We disagree with

defendant and the People, and conclude that a *Watson* standard of review is the correct standard here.

Additionally, any error in refusing the requested modifications to CALCRIM No. 705 was harmless under *Watson*. There is no reasonable probability that the jury would have found the robbery-murder special-circumstance allegation *not true* had CALCRIM No. 705 been modified as defendant requested. First, and as discussed, the other instructions adequately and thoroughly covered the points defense counsel sought to emphasize by modifying CALCRIM No. 705. Second, defense counsel thoroughly explained the difference between direct and circumstantial evidence in his closing argument. Counsel also forcefully argued that the only evidence supporting the mental state element of the special circumstance allegation was circumstantial, and there were other, more reasonable conclusions to draw from the circumstantial evidence—conclusions other than that defendant acted with intent to kill or reckless disregard for life when he participated in the robbery.<sup>6</sup>

Additionally, the jury could have reasonably rejected defense counsel’s argument that defendant’s statements to police—the only direct evidence of his intent or mental state—reflected a lack of intent to kill or reckless disregard for human life. Instead, the

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<sup>6</sup> Defense counsel argued: “So except for when somebody says, [t]his is what I was thinking, that would be direct evidence of intent except that everything else is circumstantial.” Counsel also told the jury: “When you go through the circumstantial evidence here, which on the issue of his state of mind is everything other than [defendant’s] statements, you have to apply these tests. You have to determine what fact is it that [you’re] asked to find? . . . What reasonable explanations are there and [what] conclusions can [you] draw from that fact?”

jury could have reasonably found the robbery-murder special-circumstance allegation true based on the ample and opposing circumstantial evidence that defendant acted with reckless disregard for human life when he participated in the robbery. Indeed, the evidence showed that defendant continued to participate in the robbery even after seeing that Thornton was using a gun. Defendant dragged Gould around the store, slammed him against a wall, and did not stop Thornton from shooting Gould; instead, he just walked away after Thornton fired the first shot at Gould. Thus here, based on the entire record, including the evidence, the given instructions, and the arguments of counsel, there is no reasonable probability that failure to modify CALCRIM No. 705 affected the jury's true finding on the special circumstance allegation.

#### IV. DISPOSITION

The judgment is affirmed.

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KING  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.